

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 28**

**MGM GRAND HOTEL, LLC d/b/a
MGM GRAND HOTEL & CASINO**

Case No. 28-RC-225344

**MGM GRAND HOTEL, LLC's REPLY IN SUPPORT OF ITS EMERGENCY MOTION
TO RESCHEDULE OBJECTIONS HEARING**

The Union has made a handful of arguments. First, it asserts that the Motion should be denied because there is no evidence that the subpoenas issued to Fajardo and Mutter will yield relevant information. That is false. The Employer is informed that Mutter communicated with both Slot Supervisors and members of the voting unit via text message, Facebook messenger and perhaps other means. Some of those communications were provided to the Employer prior to filing its objections. Because the Employer lacks the ability to compel non-supervisory employees to participate in interviews related to election proceedings, the only method of determining who Mutter contacted and the contents of those communications is through the subpoena.

Mutter resigned his position from MGM Grand two weeks ago. He is no longer within the Company's control.

Second, the Union argues that an adverse inference or other sanction would be successful. That too is false. Mutter and Fajardo's communications, based on witness interviews, will contain direct evidence of prounion, objectionable conduct, including the identity of voters and other supervisors at whom that conduct was directed. Indeed, Mutter's communications to each member of the voting unit are self-evidently material and significant. It would be impractical to call every member of the voting unit to testify. And, how would an adverse inference or other evidentiary sanction cure Mutter's misconduct if he simply asserts that he "cannot recall" his conduct?

Further, unless the Union will stipulate that Mutter and others acted as its agent within the meaning of Section 2(13) of the Act, neither an adverse inference nor other evidentiary sanction can provide a fair and appropriate remedy. Put simply, an adverse inference is no substitute for direct evidence, nor is live testimony without the benefit of documents used to establish and confirm personal knowledge sufficient.

The Employer is not seeking to engage in a fishing expedition. There is no doubt that Mutter's communications contain material, critical evidence relevant to the Employer's objections. The Employer is aware that Mutter was one of the individuals the Union designated to ensure that voters remained supporters of the Union throughout the election period. When interviewed, Mutter would give only limited information. But pointedly he would not deny that he communicated with voters via text, Facebook messenger and verbally before the petition was filed and throughout the period leading up to the vote. Mutter would not deny that he attended meetings at the Union hall throughout the election period.

The text messages in the Union's possession and control will not show who Mutter and Fajardo contacted with pro-union speech.

The Employer did not "sit" on its information. It filed its Motion promptly, the morning of the first business day after it learned of the issue. It is not engaging in strategic delay. The appropriate procedure in this instance is to postpone the hearing so that the Employer can continue its efforts to recover Fajardo's messages, to require Mutter to provide his response to the subpoena at the required time, and if Mutter's response is incomplete, to allow the Employer to request that the Region initiate enforcement proceedings so that at the very least Mutter's phone can be forensically inspected and text messages to voters and others can be recovered. The Employer should be given the opportunity to obtain this evidence so that it can be used when presenting its

case and meeting the burden of proof.

Finally, with respect to Ramirez, *Greenpark Care Center* does not apply. That case involved two months of prior notice. The Regional Director scheduled the hearing just over a week ago. Subpoenas for documents could not be issued before then. The Employer is informed, as set forth in its objections, that Ramirez tainted the outcome of the election. A brief delay to ensure that the Employer can enforce its subpoena is appropriate.

Travel to and from Michigan can be costly. But it does not compare to the prejudice imposed on the Employer by preventing it from obtaining relevant information. Post-election proceedings often remain pending before the Board for months or even years. A brief postponement of five days will not prejudice the Union or anyone else in a material way.

Dated: September 17, 2018

Respectfully submitted,

JACKSON LEWIS P.C.

By: /s/ Paul T. Trimmer
Paul T. Trimmer
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CERTIFICATE OF SERVICE

Case Name: MGM GRAND HOTEL, LLC

Case No.: 28-RC-225344

I, Paul Trimmer, declare that I am employed with the law firm of Jackson Lewis P.C., whose address is 3800 Howard Hughes Pkwy, Suite 600, Las Vegas, NV 89169. I am over the age of eighteen (18) years and am not a party to this action. On September 17, 2018 I electronically filed and electronically served a copy of the foregoing **EMPLOYER'S REPLY IN SUPPORT OF ITS MOTION** to Region 28 Regional Director Cornele A. Overstreet. In addition, I served additional copies of the objections via email to:

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I declare under penalty of perjury under the laws of the State of Nevada that the above is true and correct.

Executed on September 17, 2018, at Las Vegas, NV.

/s/ Paul Trimmer

Paul Trimmer